DEC 15 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. 572

TRADERS & GENERAL INSURANCE COMPANY, a corporation,
Petitioner,

vs.

MARTHA CHAMP, HELEN CLAASSEN, FRANK DUECK, GERRY DUECK, FREDERICK DUECK, WILLIAM DUECK and MARGARET DYCK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.

WILLIAM H. ABRAMS,
1310 Wilshire Boulevard,
Los Angeles 17, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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STATUTE

United States Code, Title 28, Sec. 1254(1) 2

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

TRADERS & GENERAL INSURANCE COMPANY, a corporation,
Petitioner,

vs.

MARTHA CHAMP, HELEN CLAASSEN, etc. *et al.,*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.

Petitioner Traders & General Insurance Company, a corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed September 6, 1955, rehearing denied October 27, 1955.

Citation to Opinions Below.

The finding of fact and conclusions of law of the District Court [R. 28-40] are not reported, nor is the judgment of the District Court [R. 41-42]. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto [Appx. p. 1], is reported in 225 F. 2d 802, and the opinion of the same Court on denial of a rehearing printed in Appendix B hereto [Appx. p. 11] is not yet reported in the Federal Reporter.

Jurisdiction.

The opinion of the Court of Appeals was filed on September 6, 1955. [Appx. pp. 1-10; R. 209-217.] Rehearing was denied by a Per Curium Opinion on Petition for Rehearing, filed October 27, 1955. [Appx. pp. 11-12; R. 219-221.] Judgment affirming the judgment of the District Court was filed and entered November 10, 1955. [R. 218; Appx. D, p. 17.]

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented.

(1) Whether, under the guise of construction, Courts may add to an automobile insurance policy which plainly provides that it

> "may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period"

a requirement that if the company has constructive notice of a change of the insured's address notice of cancellation must be sent to the new address and be received there before cancellation is effective.

(2) Whether knowledge of a change of address communicated to an agent is notice to the principal where the insurance contract provides:

> "Notice to any agent or knowledge possessed by any agent or by any other person shall not effect

a waiver or a change in any part of this policy or estop the company from asserting any rights under the terms of this policy; nor shall the terms of this policy be waived or change, except by endorsement issued to form a part of the policy signed by an authorized representative of the company."

Statement.

Petitioner issued a policy of automobile insurance to Alma Louise Williams at Los Angeles. The policy contained the provisions quoted in the Questions Presented. After the issuance of the policy Petitioner learned that the insured was not 21 and, pursuant to its policy not to insure minor owners, it exercised its right of cancellation by mailing to the insured at the address given in the policy, a written notice of cancellation. In the meantime, the insured had removed from Los Angeles to Paso Robles, California, where the notice of cancellation was forwarded by the postal authorities. She received the notice on December 6, 1951, but on December 5, 1951 she had become involved in an accident.

A dispute arose between the insured and petitioner as to whether the mailing of the notice was an effective cancellation. The insured claimed that she had advised a person whom she claimed to be an agent of Petitioner of her change of address, while Petitioner claimed that the purported agent was not in fact its agent and that, anyway, it had complied strictly with the policy provisions with respect to cancellation, by mailing the notice to the address of the insured appearing on the policy, more than five days before the loss and that the policy had terminated.

This dispute was submitted to the District Court in Petitioner's action for declaratory relief [R. 3-12]. Jurisdictions of the District Court was invoked because of diversity of citizenship between the litigants.

After trial the District Court filed findings of fact and conclusions of law [R. 28-40] and entered judgment thereon on November 16, 1953 [R. 41-42].

Petitioner thereafter filed notice of appeal to the United States Court of Appeals for the Ninth Circuit [R. 43].

The Court of Appeals decided that the insurer had a duty, in spite of the quoted provisions of the policy, to send its notice of cancellation to the new address of the insured, stating,

> "We assume that if notice of change of address had been sent to the home office of Traders[1] (if Mrs. Williams could have found the home office),[2] no court would have tolerated the literal terms of the policy and let Traders discharge its duty to the insured by sending the notice to the old address." [R. 214, Appx. p. 7.]

Further revealing its innate hostility to the provision in the policy with respect to cancellation (which is taken from the standard automobile liability policy prepared by the Insurance Section of the American Bar Association), the Court said

> "Parenthetically, we think if it were ours to decree there would be no harm in a rule of law that no notice of cancellation (where there was no fraud on

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[1]The opinion of the Court of Appeals uses this abbreviation for petitioner.

[2]The policy designates in large letters that the home office is Dallas, Texas [R. 60].

the part of the insured) could be effective until it reached the insured, provided the insured had left open the channels of communication to him and had not removed himself an unreasonable distance away." [R. 215, Appx. p. 7.]

The Court of Appeals held that, although there was no fraud or unfair dealing, the provision of the policy quoted in Question (2) is ineffective where an admitted agent of Petitioner had been requested to pick up the policy [R. 213] and where that agent had forwarded the request to Consumers (held on conflicting evidence to be Petitioner's agent), deciding that the claimed communication of a change of address by the insured to Consumers was knowledge to Petitioner and that Petitioner was thereafter bound to send any notices of cancellation to the insured's new address.

On denying the petition for rehearing a *Per Curiam* Memorandum was issued [R. 220-221, Appx. pp. 11-12] revealing still further the Court of Appeal's misconception as to the provisions of the policy. It said:

> "The policy calls for notice. Granted that in the ordinary case the parties may agree that a mailing which is most likely to reach the insured will be sufficient notice, yet the situation is different if it be insisted that although notice is required, notice which will be no notice at all shall nevertheless be called notice. It could as well be provided that a mere entry on the company's books would be deemed notice. To say that what is not notice shall nevertheless be notice is repugnant to the clause requiring notice.
>
> "Insurance Companies should know that not everything they write into their policies can be given effect." [R. 221, Appx. p. 12.]

Reasons for Granting the Writ.

1. The policy here under consideration is the standard automobile insurance policy, prepared by a committee of the Insurance Section of the American Bar Association in conjunction with committees of the National Bureau of Casualty & Surety Underwriters and the American Mutual Alliance. (Insurance Policy Annotations, published by American Bar Association, 1944, p. 9). The clauses under consideration here are standard clauses in this standard automobile policy. It is in general use all over the United States. It is not an exaggeration to say that there must be millions of policies outstanding every year containing these very clauses.

The wording of the policy was not rashly arrived at but is the composite work of many minds, including the Insurance Section of the American Bar Association.

The opinion of the Court of Appeals therefore presents a problem of general importance to all casualty insurers on the one hand and to all the millions of persons carrying the standard automobile liability policy. A palpably erroneous decision on so important a document, and one in such widespread use can only lead to confusion and conflict with other Circuits in which the matter is bound to come up in the course of time, and, in the meantime to extreme uncertainty in the relations between insurers and insureds.

2. It is obvious from the face of the opinion that the Court of Appeals has refused to give effect to the provisions of the policy. In its *per curiam* opinion on denial of a rehearing it states that the policy requires notice. This is not the fact. The policy, as the quoted provisions show

(Appx. p. 2), requires *the mailing of notice,* and states that such mailing shall be sufficient proof of notice.

There was no fraud, overreaching or unfair dealing here on the part of petitioner. Its conduct cannot be criticized, unless it is reprehensible in insurance companies to include such clauses as the ones here under consideration in their policies. The facts given under (1) as to the wide use of our policy and its universal approval show that there is nothing blameworthy in the use of its cancellation clause. Reflection will show that because of the vast number of policies of this type in force it is prohibitive for companies to establish elaborate checking systems as to changes of address, especially since these policies are ordinarily written on a yearly basis. The high mobility of our American population, and their frequent change of location from place to place make it fair to expect that insureds make certain of the receipt of their mail by placing with the postal authorities the customary forwarding request. It is judicially known that Los Angeles and Paso Robles are not at opposite ends of the world, and that this is not a case where a communication directed to Los Angeles is not calculated to reach quickly people in Paso Robles who have properly placed changes of address with the postal authorities.

3. The policy sets forth in language that could not be any plainer and freer from ambiguity how petitioner may cancel the policy.

An insurance policy is a contract and—in the absence of ambiguities—will be construed like any other contract.

Parties contracting for insurance have the right to enter into any kind of contract they may agree upon, and the judiciary has not reserved the exercise of veto

over insurance provisions, unless they are contrary to public policy. There can be no claim to that effect here.

Unless, therefore, a contract is contrary to law, the courts should not assume a guardianship or special role of protection over insureds and strike down provisions not to their liking.

Courts are not empowered under the guise of interpretation or construction, to add to, or detract from, contracts or modify their provisions.

> *Tanner v. Title Ins. & Trust Co.* (1942), 20 Cal. 2d 814, 824, 129 P. 2d 383, 389.

We respectfully submit that the petitioner is entitled to have the policy enforced exactly as it is written. Conversely, there can be no doubt that, if the change of address had come to the attention of petitioner—which it did not—and if it had then mailed the notice to Paso Robles, the insured would have had a perfect right in case of non-receipt to insist that petitioner did not comply strictly with the policy provision regarding notice.

4. The Court of Appeals is in error in its appraisal of the probable California law on the subject. In *Naify v. Pacific Indemnity Company* (1938), 11 Cal 2d 5, 10, 76 P. 2d 663, 666, Naify bought a car and financed it through Pacific Finance Company. The seller obtained insurance from Pacific Indemnity Company. The plaintiff had no choice of insurers. The premium was included in the instalment payments. The policy of insurance contained a cancellation clause identical with the one here involved. The policy was cancelled, but Naify continued to pay the premiums, not having actually received notice of cancellation. The court, in answering

the question whether the receipt of the notice was necessary said:

> "At the outset we are met with a question raised by *amici curiae* on behalf of various insurance companies, namely, whether a notice of cancellation, sent to the address of the assured as stated in the policy, and pursuant to a provision in the policy stating that the mailing thereof shall be sufficient notice, is effective despite lack of receipt by the insured. In this simple form, the question may perhaps be answered in the affirmative (see Raiken v. Commercial Cas. Ins. Co. (N. J.), 135 Atl. 479), though it has not yet been directly ruled on in this jurisdiction."

While this is dictum, it leaves small room for guesswork as to the frame of mind of the Supreme Court of California. It clearly portends that the California courts will probably follow the trend of authority in this respect, as settled in,

> *Gendron v. Calfert Fire Insurance Co.* (1943), 47 N. M. 348, 143 P. 2d 462.

This case contains such a clear expression of the law that we set forth excerpts from it in Appendix C (Appx. pp. 13-17).

Other cases that have held the mere mailing to be valid notice regardless of receipt are:

> *Medford v. Pacific National Fire Insurance Co.* (1950), 189 Ore. 617, 219 P. 2d 142;
>
> *Boyle v. Inter-Insurance Exchange of Chicago* (1948), 335 Ill. App. 386, 82 N. E. 2d 179;
>
> *Trinity Universal Insurance Co. v. Willrich* (1942), 13 Wash. 2d 263, 124 P. 2d 950, 142 A. L. R. 1;

O'Daniel v. Michigan Mutual Liability Co. (1950), 88 Fed. Supp. 339;

Woodard v. Calvert Fire Insurance (1951), ... Ky. 512, ..., 239 S. W. 2d 267;

Midwestern Insurance Co. v. Cathey (1953), ... Okla. ....., 262 P. 2d 434.

5. The opinion of the Court of Appeals does violence to the provision of the policy that notice to or knowledge of an agent shall not effect a waiver or change in any part of the policy. While we reiterate that even if an agent of petitioner knows of the insured's change of address, this is immaterial because the petitioner terminated the policy in strict and literal compliance with the cancellation provision, the Court of Appeals also disregarded and eliminated from the policy by construction the equally plain provision regarding notice to or knowledge of an agent, quoted under the questions presented.

The Court of Appeals holds in effect that notwithstanding the plain provisions of the contract saying that,

> "notice to any agent, or knowledge possessed by any agent . . . shall not effect a waiver or a change in any part of this policy,"

notice of change of address to an agent is notice to the company and that the notice of cancellation must be sent to the address which the agent knows. This is in plain conflict with California law called to the attention of the Court of Appeals.

See:

Moriarty v. California Western States Life Ins. Co. (1937), 22 Cal. App. 2d 260, 70 P. 2d 684 (hearing by Supreme Court denied);

Pierre v. Metropolitan Life Insurance Company (1937), 22 Cal. App. 2d 346, 70 P. 2d 985 (hearing by Supreme Court denied);

Wilson v. Maryland Casualty Co. (1937), 19 Cal. App. 2d 463, 65 P. 2d 903;

Hargett v. Gulf Ins. Co. (1936), 12 Cal. App. 2d 449, 55 P. 2d 1258;

Cochens v. Prudential Insurance Co. (1935), 4 Cal. App. 2d 172, 40 P. 2d 902 (hearing by Supreme Court denied).

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: December 12, 1955.

Respectfully submitted,

WILLIAM H. ABRAMS,

Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Traders & General Insurance Company, a corporation, Appellant, vs. Martha Champ, Helen Claassen, Frank Dueck, Gerry Dueck, Frederick Dueck, William Dueck and Margaret Dyck, Appellees. No. 14,191. September 6, 1955.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: POPE, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Alma Louise Williams had an automobile accident on December 5, 1951. The following day, December 6, at Paso Robles, California, she received by registered mail from the appellant, Traders & General Insurance Company of Dallas, Texas, her insurance carrier, a notice that her public liability and property damage insurance was to be cancelled effective 12:01 a. m., December 4, a time already passed. The notice was dated November 28 and was signed by one W. Rowe Verschoyle for Traders. Under Verschoyle's signature appear the words "authorized agent of the company." He seems to have been otherwise not concerned with the sequence of events here involved. The notice was executed and mailed in Los Angeles on November 28, the date it bore. However, the enevelope containing this advice of cancellation was addressed to the insured at the address shown on her policy as 572 Crescent Heights Boulevard, Los Angeles, the policy having been issued on August 13, 1951, as of August 1, 1951. By November, Alma Louise Williams

was residing at Paso Robles with her husband, Norman I. Williams, then a soldier stationed at nearby Camp Roberts. The notice was forwarded to Mrs. Williams at Paso Robles by the Post Office Department in regular course pursuant to forwarding instructions left with the post office in Los Angeles by her.

One way or another, the appellees Champ, Claassen, Dyck and the Duecks claim rights against Mr. and Mrs. Williams as a consequence of the accident.

Traders, desiring to know its position under the policy, filed an action for declaratory judgment against the Williamses and those claiming damages against them resulting from the collision. For reasons to which we shall return, the trial court held the cancellation of the policy ineffective, at least prior to actual receipt of notice, and this decision was made in the face of a cancellation clause in the policy which reads as follows:

> "This policy may be cancelled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such notice either by the named

insured or by the company shall be equivalent to mailing."[1]

The legal reasons for the decision are projected from the findings of the trial judge that notice, written and oral, of her change of address from Los Angeles to Paso Robles had been given to the agency where Mrs. Williams bought the automobile and the insurance policy at times prior to November 28, the date of dispatch of the formal advice of cancellation.

Facts concerning the automobile agency must be detailed. The insured's car, a second hand 1949 Oldsmobile, was purchased from Phil Rauch, Inc., a Studebaker dealer at 718 South San Fernando Boulevard, Burbank, California, under the usual conditional sales contract. Phil Rauch, individually, appears to have had a number of business hats, all at 718 San Fernando Boulevard or nearby. There was his automobile sales agency, above mentioned. Then he had an insurance department, Consumers Insurance Agency, Inc. (The sales agency had a California license to sell insurance and so did Phil Rauch himself.) It is clear that Rauch individually beneficially owned both Phil Rauch, Inc., and Consumers' Insurance

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[1]The policy also contained the following non-waiver clause:

"19. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of the policy; nor shall the terms of the policy be waived or changed except by endorsement issued to form a part of this policy, signed by an authorized representative of the company."

Agency, Inc. The companies were housed together and all intertwined. One Dalton Le Riche was the manager of all of Rauch's insurance business, whatever name was used. On the record, all communications from Rauch concerning the Williams policy were in the name of Consumers. The evidence indicates that the Williamses dealt with Consumers for what it was—part of Rauch.

In the office of the Insurance Commissioner of California from 1947 to 1952, there was considerable "put and take" in designating this or that arm of Rauch as agent of Traders. Consumers and Rauch himself had been officially agents of Traders until June, 1951. After June, 1951, until June, 1952, Phil Rauch, Inc., remained officially an agent of Traders' although apparently Le Riche thought all officially designated agency for any of Rauch's capacities had been terminated. Consequently, Le Riche was placing the Consumers-Rauch insurance business with Traders through one Robert I. Saunders, Los Angeles, another agent of Traders in Los Angeles. Apparently he who actually signs the policy is designated the "broker" in the insurance lexicon. The Williamses never knew Saunders, we take it, and never realized he was involved in their transactions.[2] From July, 1951, to

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[2]The address of Saunders, whose name appears on the policy as the agent who gave the policy its existence, was not stated. On the second, third and fourth pages of the policy it does appear that the home office of Traders was Dallas, Texas. No street address was given in Dallas. Moreover, no postal zone was given, although postal zoning in Dallas had been in effect about eight years. Also, although the company apparently had a West Coast office in Los Angeles, that fact was not disclosed to Mrs. Williams. No communication until the final notice of cancellation ever went to her from Traders' home office or the West Coast office. The only real address of anyone shown on the policy was that of Rauch's Consumers' Company, evidenced by the usual semi-advertising sticker on the outside of the policy.

January, 1952, the chain of dealing from customer to Traders seems to have been from customer to Consumers to Rauch to Saunders to the Los Angeles office of Traders or the same order in reverse, depending on whether correspondence was moving up or down. From the foregoing summary of the facts of the interrelation of the Rauch enterprises, it is evident that they should be treated as one and that Le Riche should be held here to have been acting for all sides of Rauch's business personality.

Traders had a reason for electing to cancel the policy, as well as a legal right to do so. Mrs. Williams was only eighteen years of age. It did not choose to insure persons of that age. The policy was issued in the belief that she was twenty-one, a misunderstanding apparently not caused by her.

Having decided to cancel, the Los Angeles office of Traders wrote Saunders, the issuing agent, to "pick up" the policy. Saunders passed the request to "pick up" the policy to Consumers. Consumers in turn, on November 9, 1951, wrote Mrs. Williams that Traders was going to cancel the policy because she was a minor. The letter was forwarded to Paso Robles. Meanwhile, Mrs. Williams insists that in the early days of October she and her husband by mail had notified Rauch, Inc., of their change of address. Receipt of the letter was denied by employees of Rauch, but the trial court found that this notice was mailed to Rauch, Inc.

Shortly after the notice of prospective cancellation was mailed to and received by Mrs. Williams, W. H. Williams, her father-in-law, called Le Riche at Rauch's headquarters on the telephone, the father-in-law then being a resident of nearby Santa Monica. There was dicussion

about the impending cancellation. That much is agreed. Williams, Senior, says he gave Le Riche the address in Paso Robles of his son and daughter-in-law. Le Riche insists that he was advised only that he, Williams, "was taking it up at the time with me [Le Riche] because his daughter was up in the north with her husband." But the trial court found that the elder Williams did give Le Riche the new address at Paso Robles. It is not this court's function to weigh the evidence. Had the trial court found the notice was not given, we would not disturb the finding. Naturally, the father's talk with Le Riche was inconclusive.

About the same time, the young Williamses made inquiry of an insurance agency in Paso Robles about another policy to replace the old one. They were advised that they should wait until they received the official notice of cancellation and then to bring the notice in to the Paso Robles agent who probably would then write the insurance. It is not contended that no one would have written a new policy.

Of course, we must be guided here by the best appraisal we can make of what the California courts would do with this case.

It may be *dehors* our business to say so, but a close reading of the record indicates that Traders has a deep conviction that the assertions of the insured that notice was given through Rauch just are not true, that such claims are hand made. Therefore, it fights doggedly on. But the trouble is that the points of conflict in the testimony have been decided against it. Technically, Traders recognizes this in its briefs here.

We assume that if notice of change of address had been sent to the home office of Traders (if Mrs. Williams could have found the home office), no court would have tolerated the literal terms of the policy and let Traders discharge its duty to the insured by sending the notice to the old address. We think that where the company designates an insurance agent to "pick up" the policy, a feature or an aspect of cancellation, the company cannot say only the agent's fee belonged to it while he was on the errand but not his eyes or ears. The agency was not a mere messenger. The California court probably would hold that Rauch's notice was Traders' notice. Also, the prior course of dealing created apparent authority in Rauch to receive notice of change of address.

Or a California court might find an estoppel. The historic elements of estoppel may not fully check out here, but the California courts have usually been most liberal in establishing an estoppel when they find it necessary to do justice. Truck Ins. Exchange v. Industrial Accident Commission, 36 Cal. 2d 646, 226 P. 2d 583.

Parenthetically, we think if it were ours to decree, there would be no harm in a rule of law that no notice of cancellation (where there was no fraud on the part of the insured) could be effective until it reached the insured, provided the insured had left open the channels of communication to him and had not removed himself an unreasonable distance away.

Appellants here rely heavily on Gendron v. Calvert Fire Ins. Co., 47 N. M. 348, 143 P. 2d 462. That case should be distinguished from this one on its facts. There the notice of change of address, which the company in a way had, was given to an adjuster on the occasion of

previous claims against the assured and his policy. The adjuster was a man with a single mission: adjustment of a claim. Such a mission wouldn't necessarily include cancellation, as Rauch's mission did, to which notice of change of address was vital.

Among the many California cases which we have examined are the following: Early v. Owens, 109 Cal. App. 489, 293 Pac. 136; Naify v. Pac. Indemnity Co., 11 Cal. 2d 5, 76 P. 2d 663; Banker Indemnity Ins. Co. v. Industrial Accident Commission, 4 Cal. 2d 89, 47 P. 2d 719; Irving v. Sunset Mutual Life Ins. Co., 4 C. A. 2d 445, 41 P. 2d 194.

It is our judgment that the reasoning of some other courts on points material here would be received with favor in California. We refer to: Merrimack Mut. Fire Ins. Co. v. Scott, 219 Ark. 159, 240 S. W. 2d 666; Prudential Ins. Co. of America v. Saxe, D. C. Cir., 134 F. 2d 16; Maryland Casualty Co. v. Queenan, 89 F. 2d 155; Connecticut Fire Ins. Co. v. Commercial Nat. Bank, 5 Cir., 87 F. 2d 968; New York Life Ins. Co. v. Chapman, 8 Cir., 132 F. 2d 688; Schram v. Burt, 6 Cir., 111 F. 2d 557; Warfel v. United States, Court of Claims, 98 F. Supp. 340. And for a collection of apposite cases see 149 A. L. R. 1316.

We are satisfied the trial court was correct under California law in holding the cancellation here ineffective, at least prior to receipt of actual notice.

The case is not identical, but our decision in State Farm Mutual Auto Insurance Co. v. Porter, 186 F. 2d 834, certainly is pertinent and a harbinger of the result we reach here. The underlying rationale of the case is about the same. There is was held, *inter alia,* that where

admissions against interest were pertinent and relevant to an adjuster's business at hand in attempting to adjust a claim, such admissions were commensurate with the apparent authority which he was exercising and were admissible in evidence. See California Civil Code, Sec. 2319.[3]

When Rauch's letter of warning went to Mrs. Williams it was not under the badge of a messenger service; it was the label of him who had serviced the policy for Traders with Mrs. Williams. The notice of change of address given by the father-in-law was sufficiently close in time to the writing of the letter that it could not be said that so much time had elapsed that there was no reason for Mrs. Williams to think that Rauch no longer had his ostensible authority.

Stated another way, if Rauch (Consumers) had authority to write the letter to Mrs. Williams, didn't it have authority to receive a reply? To whom else but Rauch would Traders expect Mrs. Williams to reply? And if Rauch could receive a reply, could Rauch only listen, but not heed?

This is not the case of notice, *i. e.,* knowledge, picked up in some collateral transactions or notice picked up in the breast of another agent not connected with the chore of cancellation. For such, Traders probably would not be chargeable here.

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[3]California Civil Code 2319 is as follows:

"AGENT'S NECESSARY AUTHORITY. An agent has authority:

"1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency; and,

"2. * * *"

In closing this opinion, we believe that we should report that at the threshold of the case we were concerned with the question (not raised by the parties) of whether the lower court, and consequently we, had jurisdiction. Is Canadian Indemnity Company v. Republic Indemnity Company, 9 Cir., 222 F. 2d 601, applicable? In this case of Traders, the existence of $10,000 worth of public liability insurance, among other things, is at issue. Also, it appears in the record that there was a death as a consequence of Mrs. Williams' accident, and that one of the parties-defendant seeks as against Mrs. Williams to vindicate the claim growing out of the death. There is more than one claim asserted against her in excess of $3,000. We believe that this case falls on the side where the federal courts do have jurisdiction in diversity cases. See cases cited in *per curiam* opinion on motion for rehearing in Canadian Indemnity Company v. Republic Indemnity Company, *supra*.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Sept. 6, 1955.

Paul P. O'Brien, Clerk.

APPENDIX B.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Traders & General Insurance Company, a corporation, Appellant, vs. Martha Champ, Helen Claassen, Frank Dueck, Gerry Dueck, Frederick Dueck, William Dueck and Margaret Dyck, Appellees. No. 14,191. October 27, 1955.

ON PETITION FOR REHEARING.

Before: POPE, FEE and CHAMBERS, Circuit Judges.

PER CURIAM.

Upon petition for rehearing appellant asserts that this court's decision amounts to a "striking from the provision concerning cancellation the clause that a notice may be sent to the address given in the policy," and that we have substituted "a provision that the notice of cancellation shall not be effective until it has been received." Proceeding upon this premise appellant says: "Contracting parties have a right to enter into any kind of contract they may agree upon, so long as the contract does not contravene some statute or law of the land or public policy."

Appellant misreads what we have said. Our opinion has no reference to the ordinary case where the insurer has no notice of a change of address, or that the mailed notice will be unlikely to reach the insured. We dealt only with the facts of this particular case. The opinion explains why we are of the opinion that the insurer was informed of the change of address. And the question is, whether the California law permits the company to say that in this special case, it may cancel the policy by acts which will in fact not give the notice which the policy

contemplates. The policy calls for notice. Granted that in the ordinary case the parties may agree that a mailing which is most likely to reach the insured will be sufficient notice, yet the situation is different if it be insisted that although notice is required, notice which will be no notice at all shall nevertheless be called notice. It could as well be provided that a mere entry on the company's books would be deemed notice. To say that what is not notice shall nevertheless be notice is repugnant to the clause requiring notice.

Insurance companies should know that not everything they write into their policies can be given effect. An illustration of the kind of provision which must be disregarded because repugnant to the purposes of the policy as a whole is found in Eagle Indemn. Co. v. Industrial Acc. Comm., 92 Cal. App. 2d 222, 227-229, 206 P. 2d 877, 880, cited with approval in Truck Ins. Exchange v. Industrial Accident Commission, 36 Cal. 2d 646, 226 P. 2d 583, 586. Efforts to affirm what is palpably untrue must fail, as in the cases where the policy provides that an agent of the insurance company is the agent of the insured. Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130; Robinson v. United States Ben. Soc., 132 Mich. 695, 94 N. W. 211; Howe v. Provident Fund Soc., 7 Ind. App. 586, 34 N. E. 830. The effort here to affirm that in the special facts of this case, the required notice to the insured will be regarded as adequate, though it is known it will be inadequate, must likewise fail.

The petition for rehearing is denied.

(Endorsed:) Per Curiam Opinion on Petition for Rehearing. Filed Oct. 27, 1955. Paul P. O'Brien, Clerk.

APPENDIX C.

Gendron v. Calvert Fire Insurance Co., 47 N. M. 348 [143 P. 2d 462] (1943),

"Under the terms of the policy it is not necessary that the insured actually receive notice. So, it must be said that mailing is all that is required. Whether such notice be actually received by the insured is unimportant. *Raiken v. Commercial Casualty Co.*, N. J. Supp., 135 A. 479; and *Naify v. Pacific Indemnity Co.*, 11 Cal. 2d 5, 76 P. 2d 663, 115 A. L. R. 476. Where the insurer has strictly complied with the terms of the policy with reference thereto, failure to receive notice will not render the attempted cancellation ineffective. See Appleman on Automobile Insurance, p. 476; *Trinity Universal Ins. Co. v. Willrich*, 1942, 13 Wash. 2d 263, 124 P. 2d 950, 142 A. L. R. 1; *Frontier-Pontiac, Inc. v. Dubuque Fire & Marine Ins. Co.*, Tex. Civ. App. 166 S. W. 2d 746.

* * * The appellee company, as the trial court found, strictly complied with the terms of the policy in giving notice. There is nothing to show that at any time it had notice of any change of address on the part of appellant, and certainly no notice that appellant desired a correction or amendment of the policy to show a new permanent address. Appellee relies upon the case of *Naify v. Pacific Indemnity Co., supra,* as an indication of the proper rule to follow, and likewise of what the California court would recognize as a proper holding in a case where there had been strict compliance on the part of the company with the cancellation provision.

Notwithstanding the agent who adjusted and settled the two prior losses of appellant, the one of March 1, 1941, and the other of August 1, 1941, himself had notice of the present permanent ad-

dress of appellant as being Albuquerque, New Mexico, there is nothing to show that the insurer ever had notice thereof. And, conceding that appellee had notice that at the time of such adjustments the then permanent address of appellant was as stated to the adjuster, still, there is nothing to show that appellant desired the company to recognize such a change of address, or that he had requested it to amend the policy theretofore written to show such change.

* * * * * * * *

What would have been the result if notice of cancellation had been sent to the insured at his present Albuquerque address and he had not received it? He could very properly have complained that the cancellation was not effective because it was not attempted on strict compliance with the terms of the policy. This is not to say that the address of the policy might not be changed if properly brought to the attention of the company and a sufficient request made therefor, thereby indicating a clear intention that the insured would no longer rely upon contact with the insurer through letters mailed and to be forwarded from the address originally shown on the policy.

The policy expressly provided: 'Changes. No notices to any agent or knowledge possessed by any agent or other person shall be held to effect a waiver or change in any part of this policy; nor estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed except by endorsement issued to form a part thereof.' This clause of the policy clearly indicates that the address stated in the policy to which notices are to be sent cannot be changed except by endorsement upon the policy.

Even construing the policy strictly against the insurer, as the rule requires, yet it cannot be said that the language so employed and last above quoted is of doubtful meaning. Moreover, we can see nothing burdensome or unreasonable about this particular provision. Although the insured may be traveling from place to place, it is not disputed that he can, and the careful person usually does, leave his forwarding address at the address given in the policy, as the appellee, in fact, did; and the findings show that he received mail from the original address so given, in due course. Although he denies that he received this particular notice we are not called upon to account for his failure to receive it. It is something that might just as easily have happened had the notice been mailed to his Albuquerque address.

On the other hand, to require the company to mail notice of cancellation to an address which may have come to the attention of an adjustor and which may or may not have been forwarded to the main office of the company and which, in any event, was without a request to adopt it, would be not only unreasonable and unfairly burdensome upon the company, but it would be in entire disregard of the terms of the policy itself, adding a new provision therein not stipulated for nor specifically requested. See Raiken v. Commercial Casualty Co., *supra*. 'By the terms of the standard policy, mailing of notice is the determining factor in cancellation * * *.' Appleman on Automobile Liability Insurance.

In the latter case it was stated (135 A. 480): 'We must deal with the policy as it is written and not as the plaintiff would have it modified. A court of law is powerless to give force to the contracts of parties except as they appear in the writings themselves.'

Even had the address given in the policy been erroneous in the first instance, absent a showing of fraud sufficient to avoid the general rule, the insured should be held to the statements therein contained if it could be said that he had an opportunity of seeing and examining the policy, as he had here. *Metzgar v. Aetna Insurance Co.*, 227 N. Y. 411, 125 N. E. 814.

'The purpose of the particular provision specifying how notice should be given is of course to protect the company against changes of residence of the assured which it could not be expected to follow, while at the same time affording reasonable protection to the assured through the mail forwarding custom of the postal authorities.' *Werner et al. v. Commonwealth Casualty Co.*, 109 N. J. L. 119, 160 A. 547, 548.

And, employing the thought, and in part the language, used in the Raiken case, *supra,* 'Whether the policy could have been reformed' to incorporate a correct, new or changed address 'in a court of equity, is beside the point.' He must stand upon his rights as they are made in his contract.

We are not intrigued by the suggestion of the appellant that it would be against the public policy of the state to permit the operation of such rule as to notice. As was said in *Trinity Universal Ins. Co. v. Willrich, supra* (13 Wash. 2d 263, 124 P. 2d 955, 142 A. L. R. 1): 'There is no statute in this state which prescribes, limits, or restricts the manner of giving notice of cancellation of casualty insurance policies * * * and we are aware of no reason prompted by public policy which would prevent persons from voluntarily entering into a contract containing conditions such as those set forth in the cancellation clause of the policy herein in question.'

On the contrary, we find that we have by rule of court and by statute, in at least two instances, expressly authorized service of notice by mail, declaring the deposit thereof in the post office to be sufficient. This applies in the case of service of pleadings (Sec. 19-101(5) (b) of Rules of Civil Procedure, Comp. 1941), and Comp. Laws of 1941, sec. 53-236, makes a like provision in relation to notice of dishonor as to commercial instruments and transactions."

APPENDIX D.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Traders & General Insurance Company, a corporation, Appellant, vs. Martha Champ, Helen Claassen, Frank Dueck, Gerry Dueck, Frederick Dueck, William Dueck and Margaret Dyck, Appellees. No. 14,191.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: November 10, 1955

PAUL P. O'BRIEN, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 572.

TRADERS AND GENERAL INSURANCE COMPANY, a corporation,

Petitioner,

vs.

MARTHA CHAMP, HELEN CLAASEN, FRANK DUECK, GERRY DUECK, FREDERICK DUECK, WILLIAM DUECK, and MARGARET DYCK,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents Martha Champ, Helen Claasen, Frank Dueck, Gerry Dueck, Frederick Dueck, William Dueck and Margaret Dyck pray that the petition of Traders and General Insurance Company for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Questions Presented.

(1) Respondents submit that petitioner's Question (1) is misleading, in that neither the District Court nor the Court of Appeals arrived at its determination under the guise of construction of the policy. Further, neither court ruled that if the notice is sent to the new address, it must

be received there before cancellation is effective. Both courts ruled that if notice is sent to the old address, the company having been informed of a new address, it will not be effective until receipt. Properly, the question is whether, under the law of California, the cancellation clause quoted in petitioner's Question (1) is strictly applicable when the company has been informed by the insured of a new address, and has not notified the insured that it will not recognize that address.

(2) Respondents accept petitioner's Question (2), with the qualification that the question pertains to the law of California.

Statement.

Petitioner issued a policy of automobile insurance to Alma Louise Williams, the policy containing the provisions set forth in the petition under the heading "Questions Presented." The policy contained no direction as to how the insured might notify the insurer of a change of adddess. Mrs. Williams moved from the Los Angeles address shown in the policy to a Paso Robles address, some 200 miles away. She notified the agent of the company, who was found by the trial court to be authorized to receive such notice, of her new address. There is nothing in the record to indicate, nor is it contended by petitioner, that the company ever informed her that it would not recognize her new address.

The company informed the agent that it would cancel the policy. He wrote the insured that the policy would later be cancelled, setting forth no cancellation date. She then went to another agency to inquire about getting a new policy, but was told to wait until the cancellation notice came through. There is nothing in the record to

show, nor is it contended by petitioner, that she could not have obtained other insurance.

Thereafter the company mailed notice of cancellation to her at her old address, the notice reciting that cancellation would be effective on December 4, 1951. She was involved in an accident on December 5, 1951. She received the notice of cancellation, forwarded from the old address by the postal authorities pursuant to her change of address filed with them, on December 6, 1951. The accident of December 5, 1951, was an occurrence insured against in the policy, and the respondents claim rights under the policy by reason of damages sustained in the accident.

Petitioner brought an action in the District Court to have the policy declared cancelled effective December 4, 1951. The District Court, after trial, entered findings of fact embodying the facts as stated above [R. 28-39], conclusions of law that the insurer was estopped to deny that it had received notice of the change of address, and that the policy was in effect at the time of the accident [R. 39-40], and a judgment adverse to the petitioner, declaring the policy was in effect at the time of the accident [R. 41-42]. Developments in the suit since the entry of the judgment of the District Court are set forth in the petition under the heading "Jurisdiction" at page 2.

Reasons for Denying the Writ.

1. Petitioner argues that the Court of Appeals improperly disregarded the provision of the policy that notice to or knowledge of an agent shall not effect a waiver or a change in any part of the policy. In this, the Court of Appeals had no choice, since the Supreme Court of California has met this issue squarely, and settled the law

of California with respect to it, in *Truck Insurance Exchange v. Industrial Accident Commission,* 36 Cal. 2d 646, 226 P. 2d 583 at p. 586:

> ". . . The knowledge of [the insurer's] local agent concerning the insurance dealings with [the insured] is imputable to [the insurer]. *Eagle Indemnity Co. v. Industrial Acc. Comm.,* 92 Cal. App. 2d 222, 225-226, 206 P. 2d 877; see also, *Bankers Indemnity Co. v. Industrial Acc. Comm.,* 4 Cal. 2d 89, 92, 47 P. 2d 719. And the force of this settled legal principle is not mitigated by a provision in the policy declaring that 'notice to any agent or knowledge possessed by any agent shall not effect a waiver or a change in any part of the policy or estop the Exchange from asserting any right under [its] terms. . . .'"

It follows that we must treat this case as one in which the insurer had notice of the insured's change of address.

2. Petitioner takes the extreme position that, even conceding the insurer's prior notice of the insured's change of address, still the insurer, under the law of California, was entitled to send its notice of cancellation to the old address and rest on that notice regardless of when or whether it might be received.

Clear portents of the probable law of California on the subject are contained in the following cases, all relied on by the Court of Appeals in its decision:

Truck Ins. Exch. v. Industrial Acc. Comm., 36 Cal. 2d 646, 226 P. 2d 583;

Irving v. Sunset Mutual Life Ins. Co., 4 Cal. App. 2d 445, 41 P. 2d 194;

Naify v. Pacific Indemnity Co., 11 Cal. 2d 5, 76 P. 2d 663.

In the *Truck Insurance,* case, *supra,* it was held, under a cancellation clause similar to that in this case, that the insurer was estopped to rely on a mailing, not received, of notice of cancellation where it had been the custom of the local agent to give the insured personal notice of premium delinquency. In the *Irving* case, *supra,* the court, in refusing to recognize cancellation for non-payment of assessments on the ground that the insured had not received proper notice of assessments due under the policy, held that the president of the insurance company could waive strict policy provisions with respect to the manner in which the insured could give notice of change of address (the *Truck Insurance* case, *supra,* appears to extend this power to waive policy provisions to any agent acting within the scope of his authority). In the *Naify* case, *supra* (relied upon, surprisingly, by petitioner) the court held that a notice mailed in strict conformity with a cancellation clause similar to that in this case might not be effective, depending on the special circumstances of the case, and, in fact, was not effective in the *Naify* case. It is hard to conceive of a more persuasive special circumstance than the notice to the insurer of change of address in this case; certainly it is as persuasive as any of the circumstances in the *Naify* case.

The three cases indicate that the California courts will invoke the doctrines of waiver and estoppel where the circumstances warrant. In the light of the finding of the trial court in this case that there was a holding out by petitioner to the insured that the agent had authority to receive notice of change of address [R. 32], the failure of petitioner to repudiate the notice from the insured of change of address would seem to amount to a waiver, and there are substantial elements of estoppel

in the case. [R. 38-39]. Respondents submit that the law of California is pretty well settled against the position taken by petitioner in this case.

3. If it be conceded for purposes of argument that the California law is unsettled, then we take it that this Court will be reluctant to grant the petition if the Court of Appeals has reached a reasonable and permissible result.

Huddleston v. Dwyer, 322 U. S. 322;
Propper v. Clark, 337 U. S. 472;
Estate of Spiegel v. Commissioner, 335 U. S. 701.

At the outset, respondents should point out that they concede that a mailing to the address shown in the policy is sufficient, despite lack of receipt by the insured, where the company has not received notice of the insured's change of address. The cases cited by petitioner so hold, and properly so, since no doubt the purpose of the cancellation clause is to eliminate disputes as to the receipt of notice where the company in good faith sends its notice to an address authorized by the insured.

But this purpose should not be extended to a case in which the insurer sends its notice to an address not authorized by the insured, and it is interesting that, with but one exception, the petitioner cites no case anywhere in its petition in which there is any intimation that the insurer may have received notice of the change of address. The one exception is *Gendron v. Calvert Fire Insurance Co.,* 47 N. M. 348, 143 P. 2d 462, quoted extensively by the petitioner in its Appendix C to the petition. The Court of Appeals considered and distinguished the *Gendron* case on the ground that it was not

within the scope of the authority of the particular agent in that case to receive notice of change of address; in short, the insurer in that case had no notice of change of address. Indeed, the court in the *Gendron* case indicated that if this case should come before it, it would decide against the insurer.

The *Gendron* case was similarly distinguished in *Merrimack Mutual Fire Insurance Co. v. Scott* (Ark.), 240 S. W. 2d 666, which dealt with a cancellation clause exactly similar to that in this case and with a fact situation indistinguishable from that in this case, in which the Supreme Court of Arkansas, in ruling against the insurer, stated:

> "There is another rule, which seems to be well recognized, to the effect that where notice of the insured's change of address has been sent to the insurer, or knowledge thereof has been acquired by its agents, a notice to the insured at the address originally stated in the policy is not effective to bind him as to the consequences thereof at least in the absence of actual receipt of such notice or effective knowledge thereof."

A similar result was arrived at under the same cancellation clause and under somewhat similar facts in *Griffin v. General Accident Fire and Life Insurance Co., Ltd.*, 940 Ohio App. 403, 116 N. E. 2d 41, in which the court in construing the cancellation clause found that its intent was to raise merely a rebuttable presumption of notice which might be overcome by proof that the notice was not received. It should be noted that neither the Court of Appeals in this case nor the court in the *Merrimack* case, *supra*, arrived at its determination by any such attempt at construction—both courts simply concluded that it

was inequitable to permit literal application of the terms of the cancellation clause where the company had notice of the change of address, a conclusion legally justified under familiar principles of waiver and estoppel.

Petitioner has cited no case which on its facts is in conflict with the decision of the Court of Appeals. The *Gendron* case in its dictum, and the *Merrimack* and *Griffin* cases in their holdings, all dealing with this same cancellation clause, are in accord with the decision of the Court of Appeals. Respondents submit, therefore, that the decision of the Court of Appeals is not only a reasonable and permissible result, but is actually the only result the court could reach in the light of the authority on the matter.

4. Petitioner argues, completely outside the record, that because the clauses here involved are contained in the standard automobile policy, the matter achieves special importance.

Respondents submit that if this Court were to undertake to resolve every dispute which might arise under the standard automobile policy, it would have time for very little else. Further, the importance of the question presented is best measured, not by the number of policies outstanding, but by the extent of the conflict, if any, in the decisions. Petitioner's cases are not in point, because the insurers in those cases had not received notice of change of address, and petitioner has cited not one case which on its facts is contrary to the decision of the Court of Appeals. Respondents suspect that if there were any contrary decisions, petitioner would have found them.

The standard automobile policy has been in force with substantially this cancellation clause since 1935 (Insurance Policy Annotations, published by the American Bar Association, pp. 9, 128). Petitioner's dire predictions of future conflict and uncertainty if the decision of the Court of Appeals is allowed to stand are refuted by this 20 year history of no conflict in the decisions, but rather a remarkable unanimity and agreement with the Court of Appeals.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: January 11, 1956.

Respectfully submitted,

JOHN W. MONTGOMERY,
Counsel for Respondents.